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SUBJECT: TOP LAWYER USING YUNNAN ENVIRONMENTAL COURTS TO EXPAND
PUBLIC INTEREST LITIGATION

REF: SHANGHAI 90

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CLASSIFIED BY: David E. Brown, Consul General, U.S. Consulate
General Chengdu.

REASON: 1.4 (b), (d)

11. (C) Summary: An open-minded chief judge and new guidance for environmental courts make Yunnan Province the logical place to pursue public interest environmental litigation, one of China's top public interest lawyers said. Similar courts and early cases in Guizhou and Jiangsu have set new precedents for who can file cases, with Yunnan ready to take the next step by allowing NGOs to bring suits. "Real" NGOs, however, are hard to come by in China, most actually being registered as businesses. Other options, such as cooperatives and not-for-profits may exist. China's "perfect" constitution, which already enshrines necessary rights, and an evolving set of laws redefining burden of proof and other basic legal questions, provide tools for public interest lawyers to work with, if they dare. An emerging class of such lawyers provides hope, and the prospects for environmental litigation in China look good, she said. The USG could help by sending judges experienced in environmental cases to help train Yunnan's judges. End Summary.

12. (C) PolEconOff met October 10 in Chengdu with Zhang Jingjing (protect), Beijing-based China Deputy Country Director and Environmental Lawyer with the American NGO Public Interest Law Institute (PILI). Zhang is a former PILI fellow herself at Columbia University Law School and former Director of Litigation at the Center for Legal Assistance to Pollution Victims (CLAPV) in Beijing, where she gained notoriety domestically and internationally as one of the top public interest lawyers in China. PolEconOff first met Zhang after a June 18 talk she gave at the Wilson Center in Washington on whether environmental laws and litigation could solve water crises in China, views from which are included here, before seeing her again while she was visiting her hometown of Chengdu.

13. (U) This report also summarizes information from several detailed articles and blogs by expert lawyers and scholars who follow closely the evolution of environmental law in China, including www.chinaenvironmentallaw.com and www.greenlaw.org.cn, whose views track closely with Zhang's.

The Challenges of Environmental Litigation in China

14. (C) Zhang, who in her previous work with CLAPV gained extensive experience trying environmental cases across China -- with a one-in-three success rate -- laments the challenges of trying environmental cases at the current stage of China's

judicial development. China lacks an independent judiciary and has failed to implement good laws, cases are slow and expensive to pursue, environmental NGOs are undeveloped, and the people have no trust in the country's legal system, she said. Most importantly, there is virtually no public interest litigation in China. However, the establishment of environmental courts in several provinces, issuance of new Yunnan regulations, and a proactive stance taken by Yunnan's Chief Judge, all offer hope. (Note: Separate recent meetings by PolEconOffs with well-known environmental activists Yu Xiaogang and Wu Dengming elicited similar hopeful sentiments for the prospects of environmental litigation, particularly in SW China. End Note.)

Wuxi Environmental Court Sets Precedent

¶5. (U) Although the first "environmental courts" (trial divisions) in China were actually established in Guizhou Province (see para 6), the first significant case with regard to environmental public interest litigation actually occurred in Wuxi, Jiangsu Province. In May 2008, the Wuxi People's Court established a Trial Division of Environmental Protection (reftel). An expert on Greenlaw wrote that while such courts were initially viewed with skepticism as being established just to show government action in the wake of environmental accidents, they in fact are turning out to be much more interesting. In July 2008, the new Wuxi division accepted a filing for its first case, All-China Environmental Federation (ACEF) vs. Jiangyin Port Container. The case set a precedent for who could have standing in environmental lawsuits by allowing an environmental group to file. The catch, however, is that ACEF is not technically an NGO, but rather a government-organized NGO (GONGO, also referred to as a "quasi-official organization"), officially under the Ministry of Environmental Protection, and therefore with government backing that regular NGOs would not have.

¶6. (U) In November 2008, the court issued regulations on environmental public interest litigation that, according to a May 2009 Greenlaw article, introduced "an innovative system by

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which the Procuratorate urges relevant government bureaus to fulfill their environmental responsibilities by bringing lawsuits before the court," and which also allows pollution victims to join environmental public interest litigation as third parties. The court, however, has yet to hear any actual litigation cases, but rather has focused on administrative non-litigation cases -- which the author deemed as prudent thinking.

Guizhou Goes Further, Allows GONGO to Sue Government

¶7. (U) Of greater significance was a case accepted by the Trial Division of Environmental Protection within the Guiyang Intermediate People's Court in August 2009. (Guizhou established the court in November 2007, followed shortly thereafter by a second court in Qingzhen.) The case, which gained international attention via an AP story picked up by the New York Times, set a further precedent by allowing the ACEF to sue an actual government body, the Guizhou Province Land and Resources Administration. The Guiyang court, in the opinion of the Greenlaw article's author, "can be considered to have made the boldest judicial attempts in advancing public interest litigation by the environmental courts."

¶8. (C) Zhang offered a cooler response, however, complaining that this was not a particularly difficult case and that while the ACEF would say they are being "strategic" by picking less sensitive issues, as a GONGO they are not willing to take on the tough cases. The ACEF speaks of itself as an NGO and wants to be seen as a leader in civil society, she said, but the reality remains that it is extremely difficult for a real NGO to file an environmental case because they have yet to be given standing. An expert on Greenlaw offered a similar view, arguing that the

real breakthrough will be when a non-government affiliated NGO is allowed to file.

----- Sidebar: Zhang's Goal is Litigation, Not Mediation -----

¶9. (C) A significant aspect to the Guiyang case, according to Zhang, is that it was settled through "mediation" by the judge. There was no actual compensation and the defendant just had to promise to "do better in the future." This concept of "mediation" in China's courts, which differs from that used in U.S. courts, she explained, was advanced by current Chief Justice and President of the Supreme People's Court Wang Shengjun, known for a recent speech reminding judges that their first duty is to serve the interests of the Party and the state. Chief Justice Wang, whom Zhang says has "no legal training whatsoever," claims mediation is the best way to build a harmonious society. In reality, this is just a political way to "shoo away" cases, Zhang said. Judges are allowed to "mediate" at several points in the course of a case, but in fact the judge can use this mediation to convince plaintiffs to drop their cases. Zhang emphasized that her goal, and that of others with whom she finds common cause, is to advance the rule of law through litigation, not alternative dispute resolution (ADR).

----- Enter Yunnan: New Regulations Say Any NGO Can File -----

¶10. (C) Yunnan Province, arguably the most important area for environmental issues in China, established environmental divisions within the Kunming Intermediate Court and Yuxi Intermediate Court in December 2008, followed later by additional environmental courts in Chengjiang and Tonghai. According to Greenlaw, the province is also considering establishing courts in Dali and three other locations. In Zhang's view, Yunnan could be the key to advancing environmental litigation as environmental protection is a real priority of the provincial government, and the province's Chief Justice, former Wuhan University professor Xu Qianfei, is open-minded. After hearing some preliminary cases, provincial officials held a discussion in May on promoting environmental courts throughout the province and agreed that the minutes from the meeting would stand as a guide for future activity.

¶11. (C) The Yunnan "judicial guide," as the minutes have come to be known, raises several interesting points, according to Greenlaw experts, including standing, types of cases to be heard, burden of proof, and litigation fees. Perhaps the most important issue, Zhang said, is who has standing to file. The Yunnan Provincial Court "opened the door" in the guide by saying all legally registered social organizations (shehui tuanti, the legal term used for NGOs) can file public interest environmental

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cases with the Kunming Intermediate Court. This makes Yunnan the first court to issue language affirming that environmental protection organizations, including those without government backing, can have standing as plaintiffs. (It does not, however, allow individuals to have standing in cases other than where they have been directly harmed, or explicitly allow for class actions.)

¶12. (C) What Zhang hopes to do, she said, is make use of these new regulations by finding NGOs willing to sue the government or a specific polluter in a relevant case. Contrasting this with previous cases she has handled representing over a thousand individuals jointly suing as victims, she offered the example of illegal logging as to why this is so important -- as state-owned land, no individual can sue on behalf of the forest. Allowing an NGO to file, however, opens up new possibilities.

----- But "Real" NGOs are Rare, Are There Other Options? -----

¶13. (C) There are few "real" NGOs in China, Zhang pointed out, as many social organizations register instead as businesses or

business representative offices for convenience. Others are in fact university institutes. This makes Zhang's goal of finding qualified NGOs she can encourage to file relevant cases quite difficult. One option, she said, might be agricultural cooperatives (nongcun hezhuoshe), as they are actually considered companies under Chinese law, and Zhang hopes to see if a public interest law case filed by one of these "companies" would be accepted. Just getting cases accepted by the courts is a good start, even if they go nowhere, Zhang said.

¶14. (C) A third possibility might be nongovernmental, noncommercial enterprises (minban feiqiye, or NGNCEs), which are also governed by the 1998 regulations on social organizations. These organizations tend to be service providers such as schools, hospitals, or sports organizations which are allowed to make a profit. The environmental courts might allow this type of organization to have standing, Zhang said. One of the current PILI fellows, she added, is working on drafting a proposed regulation to allow legal-aid lawyers to register as not-for-profits. Foundations (jijinhui), she notes, are governed by a separate set of regulations issued in 2004 and so would not be as appropriate for testing the courts' willingness to allow NGOs to file.

China's "Perfect" Constitution; Slow Legal Evolution

¶15. (C) In the past 60 years, Zhang said, only one case in China has ever cited constitutional law -- a case in Shandong Province involving education rights in which the judge referenced the right to education enshrined in China's constitution. No one dared question the judge for citing the constitution to defend such a basic right, she said. Zhang hopes other brave judges will eventually make similar moves, utilizing the "perfect" constitution China already has in place that enshrines all manner of rights.

¶16. (C) At the same time, China continues to upgrade its laws in ways that should make environmental public interest litigation easier, Zhang said. On a basic level, the right to file an environmental law suit is enshrined in the Environmental Protection Law of 1989, Article 41, which is also held by scholars to provide for no-fault liability (i.e. violation of law is not required as a condition for liability). Article 87 of China's Water Pollution Control Law, as amended in 2008, shifts burden of proof to the alleged polluter to prove reasons for exemption of liability and to prove absence of a causal relationship (confirmed in Article 4, Section 3 of the Supreme People's Court Various Regulations Regarding Evidence for Civil Suits). Article 88 of the water pollution law, meanwhile, opens the door for class action cases and legal aid. Other new laws may help, she added, including the Environmental Impact Assessment Law of 2003, Solid Waste Pollution Control Law of 2005, the Property Law of 2007 (which could help individuals file cases), and Government Information Disclosure Law of 2008. Many lawyers, however, are not yet willing to reference these laws in their legal briefs, she said.

PILI to Focus on Southwest China

¶17. (C) We could not achieve our goals in Beijing, she said, because it is too sensitive in the capital, but Yunnan is far from Beijing and has an open-minded chief judge. PILI is

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therefore organizing an October training in Yunnan bringing together judges, lawyers, journalists, and community representatives for training on environmental public interest litigation. The seminar will include a discussion by two Yunnan judges on why the environmental courts have been established, in response to a statement by a National Supreme Court judge that there are not yet enough cases to support these kinds of courts.

Zhang Positive on Prospects for Environmental Litigation

¶18. (C) Zhang is optimistic regarding the prospects for environmental litigation as an avenue for increasing the rule of law in China. Of important rights issues, the government is most tolerant of environmental issues, as officials "breathe the same air and drink the same water as everyone else." They therefore cannot reasonably argue there is no pollution, because it so obvious. Chinese officials also tend to think environmental issues can be solved with technology, and so environmental activism is tolerated because it may lead to China acquiring new technologies, Zhang added. (Note: It is worth noting in "The River Runs Black," a leading work on China's environmental challenges, scholar Elizabeth Economy discusses the importance of environmental movements and litigation as often forming the vanguard in advancing rule of law, citing examples in Eastern Europe, and that authoritarian governments tend to be more tolerant of environmental agitation than other rights issues. End Note.)

¶19. (C) An emerging class of public interest and rights protection lawyers in China also provides hope, Zhang said, as well as encouragement provided by new legislation and new technologies for freedom of information that make it easier for lawyers to collect evidence. She mentioned, for example, that the freedom of information law has resulted in more government data being posted online and she often uses this information from official databases in cases against the government.

Request for USG Assistance with Judicial Training

¶20. (SBU) Zhang made a specific request for the USG to assist by bringing experienced environmental lawyers to China to conduct training for judges in the fledgling environmental courts. One of the judges in Yunnan with whom Zhang has been working told her, "We aren't professionals, we don't have any training or real knowledge in this area." PolEconOff agreed to relay this request to Beijing and Washington.

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